No. 4203

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Oregon.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Names and Addresses of Attorneys of Record.

VEAZIE and VEAZIE, Corbett Building, Portland, Oregon,
For the Plaintiff in Error.

ARTHUR C. SPENCER and ARTHUR A. MURPHY, Pittock Block, Portland, Oregon,
For the Defendant in Error.

Citation on Writ of Error.

United States of America,
District of Oregon,—ss.

To Oregon-Washington Railroad & Navigation Company, a Corporation, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein Union Assurance Society, Ltd., a Corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, the 13th day of December, in the year of our Lord one thousand nine hundred and twenty-three.

A. S. BEAN,
Judge. [1*]

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*Page-number appearing at foot of page of original certified Transcript of Record.

[Endorsed]: No. L.–8953. 30–147. United States District Court, District of Oregon. Union Assurance Society, Ltd., a Corporation, vs. Oregon Washington Railroad & Navigation Company, a Corporation, Citation on Writ of Error. U. S. District Court, District of Oregon. Filed Dec. 13, 1923. G. H. Marsh, Clerk.

Due service of the within citation is hereby acknowledged at Portland, Oregon, this 13th day of December, 1923.

A. C. SPENCER,
ARTHUR A. MURPHY,
Of Attorneys for Defendant and Defendant in Error.

In the United States Circuit Court of Appeals for the Ninth Circuit.

UNION ASSURANCE COMPANY, LTD., a Corporation,

Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant in Error.

Writ of Error.

The United States of America,—ss.

The President of the United States of America, to the Judge of the District Court of the United States for the District of Oregon, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between Union Assurance Company, Ltd., a corporation, plaintiff and plaintiff in error, and Oregon-Washington Railroad & Navigation Company, a corporation, defendant and defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 13th day of December, 1923.

[Seal] G. H. MARSH,
Clerk of the District Court of the United States for the District of Oregon.

By F. L. Buck,
Chief Deputy. [2]

[Endorsed]: No. ——. In the U. S. Circuit Court of Appeals for the Ninth Circuit. Union Assurance Society, Ltd., Plaintiff in Error, vs. Oregon-Washington Railroad & Navigation Company, Defendant in Error. Writ of Error. Filed December 13th, 1923. G. H. Marsh, Clerk United States District Court, District of Oregon. By F. L. Buck, Chief Deputy Clerk.

In the District Court of the United States for the District of Oregon.

July Term, 1922.

BE IT REMEMBERED, That on the 21st day of July, 1922, there was duly filed in the District Court of the United States for the District of Oregon an amended complaint, in words and figures as follows, to wit: [3]

No. L.–9853.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Amended Complaint.

Comes now the plaintiff and pursuant to the orders of the Court files this its amended complaint, and for cause of action against said defendant complains and alleges:

I.

That plaintiff is, and at all times herein mentioned has been, a corporation organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with its principal place of business at London, England; and plaintiff is, and at all times herein mentioned was, a citizen of the United Kingdom of Great Britain and Ireland within the meaning of the laws relating to the jurisdiction of the courts of the United States.

That the defendant is, and at all of said times was, a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business at Portland, Oregon, and is, and at all said times was,

a citizen of the State of Oregon within the meaning of the said laws of the United States.

That the amount in controversy in this action exceeds the sum or value of $3000.00 exclusive of interest and costs. [4]

II.

That on the first day of March, 1921, and thereafter, until and including the 11th day of September, 1921, the Spokane, Portland & Seattle Railway Company, a corporation, was the owner of five freight-cars of the type commonly known as box-cars, and designated respectively by the numbers 3164, 3287, 3187, 3041 and 3179. That on said first day of March, 1921, the plaintiff was, and at all times herein mentioned has been, engaged in the business of insuring against loss or damage to property by fire; and on said first day of March, 1921, the plaintiff executed and issued to the said Spokane, Portland & Seattle Railway Company its policy of insurance numbered 65037, wherein and whereby the plaintiff insured the said Spokane, Portland & Seattle Railway Company for the term of one year, commencing on the first day of March, 1921, and ending on the first day of March, 1922, against loss or damage by fire to the said freight-cars, in the sum of $750.00 on each of the said freight-cars; and said policy of insurance remained and was in full force and effect on the 11th day of September, 1921.

III.

That on the 11th day of September, 1921, the freight-cars aforesaid were standing with other

cars on a side-track of the Spokane, Portland & Seattle Railway Company, adjacent to and within about fifteen feet from the main track of said Spokane, Portland & Seattle Railway Company, near McLaughlin, in the State of Washington; and on said day the defendant, by its servants, agents and employees, ran over said main track and past said freight cars a train composed of cars and an engine or engines belonging to and [5] operated by defendant. That said train was an east-bound freight train of defendant which passed said point at about noon of said day; that plaintiff does not know the number of said train, but defendant is fully informed as to the origin and circumstances of the fire hereinafter mentioned, and knows which of its trains caused the said fire. That defendant was so running its train over the tracks of the Spokane, Portland & Seattle Railway Company, under and by virtue of an agreement between the defendant and said Spokane, Portland & Seattle Railway Company, wherein the said Spokane, Portland & Seattle Company was designated as the Home Company and the defendant was designated as the Foreign Company, and wherein and whereby it was provided and mutually agreed, among other things, as follows:

> The Home Company shall not be held liable for or on account of any loss, damage, or delay, to the trains, engines, cars or other property of any kind of either company, nor to freight, baggage, or other property of any kind carried in or upon such trains, engines or cars, nor for or on account of any injury to or death of pas-

sengers or employees of either company, or other persons whomsoever, which may be incurred or sustained by reason of such trains being detoured, or by reason of such trains being delayed in such detouring, in whatever manner the same may be caused or occasioned, whether by or through the negligence of the Home Company, its agents or servants, or by reason of defects in the tracks, structures or facilities furnished by the Home Company, or otherwise, it being understood and agreed that all risk of such delay, loss, damage, injury and death shall be and is hereby assumed by the Foreign Company, and the Foreign Company shall and will hold harmless the Home Company from and against all liability or claims for all such delay, loss, damage, injury and death, and shall and will execute and deliver, or cause to be executed and delivered, to the Home Company, upon request, a full and complete release, satisfaction and discharge of all claims therefor, and will pay, or cause to be paid, all costs, and expenses incurred by either Company in the clearing of the wrecks and repairs of equipment, track and property in which by reason of detour movements covered by this agreement the engines, trains or cars of the Foreign Company are concerned, expenses and attorneys' fees incurred in defending any action, which may be brought against the Home Company on account of any such claim or liability and any judgment which may be rendered against the Home Company on account thereof. [6]

IV.

That at said time, and for about three months prior thereto, the weather was and had been hot and dry, and on said 11th day of September, 1921, the vegetation, structures and combustible objects along and adjacent to the track of the Spokane, Portland & Seattle Railway Company over which the defendant was so operating its train, were dry and inflammable; and said condition was well known to defendant.

V.

That nevertheless, defendant carelessly and negligently hauled said train with its engine or engines burning coal, which produced and threw out large quantities of burning particles upon the dry vegetation and other dry and inflammable objects adjacent to said track, and carelessly and negligently failed to equip its said engine or engines with safe, proper or adequate devices for preventing the escape of such burning particles, and carelessly and negligently failed to keep its said engine in such repair and condition as would prevent the throwing out of such burning particles, and carelessly and negligently hauled in said train a large number of cars constituting a load so great that said engine or engines labored heavily and thereby increased the number and size of the burning particles so thrown out, and carelessly and negligently ran the said train at a speed so great that the labor of the engine and the throwing out of burning particles was further increased. That while said train of defendant was so being run, and by reason of such negligence,

defendant negligently and carelessly caused its engine attached to said train to throw [7] out burning particles of coal or other substance upon the said freight-cars or the dry vegetation or other dry material adjacent to the said freight-cars, and thereby set the said freight-cars on fire.

VI.

That by the fire so caused and set, said freight-car number 3164 was damaged in the amount of $924.25, and said car numbered 3287 was damaged to the amount of $917.79, and said car numbered 3187 was damaged to the amount of $921.37, and said car numbered 3041 was damaged to the amount of $908.61, and said car numbered 3179 was damaged to the amount of $56.49; making the total of damage upon and to the said five cars $3,728.52. That under and by reason of its policy of insurance aforesaid, the plaintiff has paid to said Spokane, Portland & Seattle Railway Company $750.00 each on account of such loss and damage to the cars numbered 3164, 3287, 3187, and 3041, and the sum of $56.49 on account of such loss and damage to car numbered 3179; making the total paid by plaintiff to the Spokane, Portland & Seattle Railway Company on account of such loss and damage, $3,056.49. That such payment was made by plaintiff to the Spokane, Portland & Seattle Railway Company on or about the 18th day of November, 1921.

VII.

That in and by the policy of insurance aforesaid it was, [8] among other things, provided and agreed between plaintiff and the Spokane, Portland

& Seattle Railway Company, that if plaintiff should claim that any fire causing loss or damage insured against was caused by the act or neglect of any person or corporation, the plaintiff should, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting from such fire, and that such right of recovery should be assigned to plaintiff by the insured on receiving such payment. That upon payment by plaintiff to the Spokane, Portland & Seattle Railway Company of said sum of $3,056.49 as aforesaid, and in consideration thereof, Spokane, Portland & Seattle Railway Company did assign, set over, transfer and subrogate unto the plaintiff all of its rights, claims and causes of action against the defendant for or on account of the said fire and the loss and damage to the said freight-cars resulting therefrom, to the extent of said sum of $3,056.49, and plaintiff is still the owner and holder of the rights, claims and causes of action so assigned and transferred.

WHEREFORE, plaintiff prays judgment against defendant for the sum of $3,056.49, and for its costs and disbursements.

VEAZIE & VEAZIE,
Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,—ss

I, R. E. Menefee, being first duly sworn, depose and say: That I am the attorney-in-fact within and for the State of Oregon of the above-named plaintiff, Union Assurance Society, Ltd., and [9]

make this verification on its behalf; that I know the contents of the foregoing amended complaint, and believe the same to be true.

R. E. MENEFEE.

Subscribed and sworn to before me this 20th day of July, 1922.

[Seal] J. C. VEAZIE,
Notary Public for Oregon.

My commission expires Feb. 8, 1925.

District of Oregon,
County of Multnomah,—ss.

Due service of the within amended complaint is hereby accepted in Multnomah County, Oregon, this 20th day of July, 1922, by receiving a copy thereof, duly certified to as such by J. C. Veazie, attorney for plaintiff.

A. A. MURPHY,
Attorney for Defendant.

Filed July 21, 1922. G. H. Marsh, Clerk. [10]

AND AFTERWARDS, to wit, on the 3d day of August, 1922, there was duly filed in said court an answer to amended complaint, in words and figures as follows, to wit: [11]

In the District Court of the United States for the District of Oregon.

No. L.–8953.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

Plaintiff,

vs.

OREGON–WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Answer.

Comes now the defendant herein and for its answer to plaintiff's amended complaint herein, admits, denies and alleges, as follows:

I.

Denies that it has any knowledge or information sufficient to form a belief as to the truth or falsity of the matters set forth in paragraph I of plaintiff's said amended complaint, and defendant therefore denies the same and the whole thereof, except that defendant admits that the defendant is and at all of the times mentioned in plaintiff's amended complaint was a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of busi-

ness at Portland, and that it is and at all of said times was a citizen of the State of Oregon within the meaning of the laws of the United States relating to the jurisdiction of the courts of the United States.

II.

Denies that it has any knowledge or information sufficient to form a belief as to the truth or falsity of the matters set forth in paragraph II of plaintiff's said amended complaint, and defendant therefore denies the same and the whole thereof.

III.

Denies each and every allegation set forth in paragraph [12] III of plaintiff's amended complaint and the whole thereof, except that defendant admits that on the 11th day of September, 1921, the Spokane, Portland & Seattle Railway Company, a corporation, owned a railroad right of way at and near McLaughlin, in the State of Washington, together with a main track located on said right of way, and that said Spokane, Portland & Seattle Railway Company was at said time operating a railroad over said right of way and track, and that on said 11th day of September, 1921, a certain eastbound freight train belonging to defendant was run and operated over and along said right of way and track of said Spokane, Portland & Seattle Railway Company passing McLaughlin, Washington, at about noon of said day, with certain engines numbered 2113 and 2128, the property of the defendant, operated, directed and controlled by a pilot engineer furnished by said Spokane, Portland & Se-

attle Railway Company, subject to the rules and regulations of said company and to the orders of the train-dispatcher of said company. And said defendant further admits that said train was run and operated over said track of the Spokane, Portland & Seattle Railway Company under and by virtue of an agreement between the defendant and said Spokane, Portland & Seattle Railway Company wherein the said Spokane, Portland & Seattle Railway Company was designated as the Home Company and the defendant was designated as the Foreign Company, and wherein and whereby it was provided and mutually agreed, among other things, as is set forth by plaintiff on page 3, lines 5 to 20, inclusive, of its amended [13] complaint.

IV.

Admits the allegations of paragraph IV of plaintiff's said amended complaint, except that defendant denies that it had any knowledge of the condition on said 11th day of September, 1921, of the property of said Spokane, Portland & Seattle Railway Company, or of the vegetation, structures or objects thereon, save only as such property, vegetation, structures and objects may have been observed by its employees during the movement of the trains of defendant over the tracks of said Spokane, Portland & Seattle Railway Company, and defendant particularly denies any knowledge of any condition respecting any of such property which required the defendant to exercise greater care and precaution than was exercised by said defendant in

the movement of its trains over the tracks of the Spokane, Portland & Seattle Railway Company.

V.

Denies each and every allegation, averment and thing set forth and contained in paragraphs V, VI and VII of plaintiff's said amended complaint, and each and every part and the whole thereof.

And for a further and separate answer and defense to plaintiff's amended complaint, defendant alleges:

I.

That on the 11th day of September, 1921, the defendant owned a certain freight train known and designated as Extra East No. 2113, propelled by locomotives Nos. 2113 and 2128, which was run in an easterly direction over and along the tracks of the Spokane, [14] Portland & Seattle Railway Company passing McLaughlin in the State of Washington, at about noon of said day; that said freight train was the only freight train belonging to this defendant which was run in the vicinity of McLaughlin, Washington, in an easterly direction for a period of several hours prior to noon on said 11th day of September, 1921; that said freight train was operated by a pilot engineer of the Spokane, Portland & Seattle Railway Company with the assistance of engine crews and train crews of this defendant, and subject to the orders of the train-dispatcher of said Spokane, Portland & Seattle Railway Company, and to the rules and regulations of said company; that on said 11th day of September, 1921, and immediately prior thereto said locomotives numbered

2113 and 2128 were of first-class construction and repair and were equipped with suitable and proper spark-arresting devices, and said spark-arresting devices were at said time and place in proper position and in good condition and repair, and said locomotives were and each of them was furnished and supplied by this defendant with fuel of first-class quality and grade, and said locomotives were properly operated and maintained by competent employees, and were not overloaded, nor working up to their capacity, and everything was done in the construction, maintenance and operation of said locomotives to make them safe and secure against the escape of fire therefrom, and this defendant alleges that the fire complained of by plaintiff was not ignited or set by any of its officers, agents or employees, or by locomotive No. 2113 or locomotive No. 2128, or by any other locomotive of defendant operated over the line of railroad of the Spokane, Portland & Seattle Railway Company, or otherwise, and defendant [15] alleges that said alleged fire complained of by plaintiff was not caused by or through any act, fault, negligence or want of care on the part of this defendant or any of its agents, servants or employees. That the circumstances herein referred to are the same circumstances mentioned in plaintiff's amended complaint.

WHEREFORE, defendant having fully answered plaintiff's amended complaint herein, prays that this action be dismissed and that plaintiff take noth-

ing thereby, and that defendant do have and recover its costs and disbursements herein.

A. C. SPENCER,
ARTHUR A. MURPHY,
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss

I, C. E. Cochran, being first duly sworn and upon oath, depose and say:

That I am assistant secretary of Oregon-Washington Railroad & Navigation Company, the defendant in the above-entitled cause, and that I have read the foregoing answer to plaintiff's amended complaint and know the contents thereof and that the same is true as I verily believe.

C. E. COCHRAN.

Subscribed and sworn to before me this 2d day of August, 1922.

[Seal] F. J. BETZ,
Notary Public for Oregon.

My commission expires February 13, 1924.

Service by copy admitted at Portland, Oregon, August 2, 1922.

VEAZIE & VEAZIE,
Solicitors for Plaintiff.

Filed August 3, 1922. G. H. Marsh, Clerk. [16]

AND AFTERWARDS, to wit, on the 8th day of August, 1922, there was duly filed in said court a reply, in words and figures as follows, to wit: [17]

In the District Court of the United States for the District of Oregon.

No. L.–8953.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

Plaintiff,

vs.

OREGON–WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Reply.

Comes now the plaintiff and replying to the further and separate answer and defense of the defendant denies the same and each and every allegation thereof except that plaintiff admits that defendant owned a certain freight train propelled by its locomotives, which was run in an easterly direction over and along the tracks of the Spokane, Portland & Seattle Railway Company, passing McLaughlin, in the State of Washington, about noon of said day, and admits that said freight train was operated by engine crews and train crews of defendant; and plaintiff denies any knowledge or information sufficient to form a belief as to the number or designation of said train, or the numbers of the locomotives

propelling said train, or whether said freight train was operated subject to the orders of the train-dispatcher of the Spokane, Portland & Seattle Railway Company, or the rules and regulations of said company.

WHEREFORE, plaintiff prays for judgment as in its complaint herein.

VEAZIE & VEAZIE,
Attorneys for Plaintiff. [18]

State of Oregon,
County of Multnomah,—ss.

I, R. E. Menefee, being duly sworn, depose and say: That I am the attorney-in-fact within and for the State of Oregon of the above-named plaintiff Union Assurance Society, Ltd., and make this verification on its behalf; that I know the contents of the foregoing reply, and believe the same to be true.

R. E. MENEFEE.

Subscribed and sworn to before me this 8th day of August, 1922.

[Seal] J. C. VEAZIE,
Notary Public for Oregon.

My commission expires February 8, 1925.

District of Oregon,
County of Multnomah,—ss.

Due service of the within reply is hereby accepted in Multnomah County, Oregon, this 8th day of August, 1922, by receiving a copy thereof, duly certified to as such by J. C. Veazie, attorney for plaintiff.

ARTHUR A. MURPHY,
Of Attorneys for Defendant.

Filed August 8, 1922. G. H. Marsh, Clerk. [19]

AND AFTERWARDS, to wit, on the 15th day of June, 1923, there was duly filed in said court a verdict, in words and figures as follows, to wit: [20]

In the District Court of the United States for the District of Oregon.

No. L.–8953.

UNION ASSURANCE COMPANY, LTD., a Corporation,

Plaintiff,

vs.

OREGON–WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Verdict.

We, the jury empaneled to try the above-entitled action, find our verdict for the defendant.

Dated at Portland, Oregon, this 15th day of June, 1923.

E. M. BURNS,
Foreman.

Filed June 15, 1923. G. H. Marsh, Clerk. [21]

AND AFTERWARDS, to wit, on Friday, the 15th day of June, 1923, the same being the 86th judicial day of the regular March term of said court,—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding —the following proceedings were had in said cause, to wit: [22]

In the District Court of the United States for the District of Oregon.

No. L.–8953.

June 15, 1923.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation.

Minutes of Court—June 15, 1923—Trial.

Now, at this day come the plaintiff by Mr. J. C. Veazie, of counsel, and the defendant above named by Mr. A. A. Murphy, of counsel; whereupon, the jury impaneled herein being present and answering to their names, the trial of this cause is resumed. And said jury having heard the evidence adduced, the arguments of counsel and the charge of the Court, retire in charge of proper sworn officers to consider of their verdict. And thereafter, said jury returns to the court the following verdict, viz.:

"We, the jury empaneled to try the above-entitled action find our verdict for the defendant.

Dated at Portland, Oregon, this 15th day of June, 1923.

E. M. BURNS,
Foreman,"

which verdict is received by the Court and ordered to be filed. Whereupon

IT IS ADJUDGED that plaintiff take nothing by this action, and that defendant do have and recover of and from said plaintiff its costs and disbursements herein taxed in the sum of $46.20, and that said defendant do have execution therefor. [23]

AND AFTERWARDS, to wit, on the 22d day of October, 1923, there was duly filed in said court a bill of exceptions, in words and figures as follows, to wit: [24]

In the District Court of the United States for the District of Oregon.

No. L.–8953.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

Plaintiff,

vs.

OREGON–WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

To the Honorable R. S. BEAN, District Judge:

The plaintiff in the above-entitled cause presents herewith its bill of exceptions, and prays that the

same may be settled, allowed and certified as provided by law.

VEAZIE & VEAZIE,
Attorneys for Plaintiff. [25]

In the District Court of the United States for the District of Oregon.

No. L.–8953.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

Plaintiff,

vs.

OREGON–WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that the above-entitled cause came on regularly to be tried before the Honorable Robert S. Bean, District Judge, on Wednesday, the 13th day of June, 1923; the plaintiff appearing by Mr. J. C. Veazie, one of its attorneys, and the defendant appearing by Mr. Arthur A. Murphy, one of its attorneys. A jury being duly empaneled and sworn, the following evidence was introduced and the following proceedings were had, to wit:

The plaintiff introduced evidence tending to prove that at the time of the commencement of this action, and at all times mentioned in the complaint, it was a corporation, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with its principal place of busi-

ness at London, England, and duly licensed, admitted and qualified to transact the business of fire insurance within the State of Oregon; that on the first day of March, 1921, and thereafter, until and including the 11th day of September, 1921, the Spokane, Portland & Seattle Railway Company, a corporation, was the owner of five freight-cars of the type commonly known as box-cars, and designated respectively by the numbers 3164, 3287, 3187, 3041, and 3179; that on the first day of March, 1921, the plaintiff, for an adequate consideration, executed and issued to the Spokane, Portland & Seattle Railway Company its policy of insurance numbered 65037, wherein and whereby [26] the plaintiff insured the Spokane, Portland & Seattle Railway Company for the term of one year commencing on the first day of March, 1921, and ending on the first day of March, 1922, against loss or damage by fire to the said freight-cars in the sum of $750.00 on each of said freight-cars; that the said policy of insurance remained and was in full force and effect on the 11th day of September, 1921; that said policy of insurance was in the usual standard form of fire insurance policies, and contained, among other things, the following provision:

> "If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss be be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to

this company by the insured on receiving such payment."

Plaintiff introduced further evidence tending to prove that on the 11th day of September, 1921, said freight-cars were standing on a side-track of the Spokane, Portland & Seattle Railway Company near the main track of said company, near McLaughlin in the State of Washington, and that on said day the defendant, by its servants, agents and employees, ran over said main track and past said freight-cars a train composed of freight-cars and two locomotives, belonging to and operated by defendant; said train being an east-bound freight train which passed said point at about noon; and that by a fire which originated in dry grass near the said freight-cars immediately after the passage of said train, four of said freight-cars were destroyed, except for salvage of the wheels and other iron parts, and the fifth of said cars was damaged to the [27] amount of $56.49; and that the damae caused by said fire to said freight-car No. 3164 amounted to $924.25, and the damage so done to car No. 3287 amounted to $917.79, and the damage so done to car No. 3187 amounted to $921.37, and the damage done to car No. 3041 amounted to $908.61, and the damage to said car No. 3179 amounted to $56.49; and that under and by reason of its policy of insurance aforesaid, plaintiff paid to the Spokane, Portland & Seattle Railway Company $750.00 each on account of such loss and damage to the cars numbered 3164, 3287, 3187, and 3041; and the sum of $56,49 on account of such loss and damage to car numbered

3179; making the total so paid by plaintiff to the Spokane, Portland & Seattle Railway Company on account of such loss and damage the sum of $3056.49; and that in consideration of such payments, the Spokane, Portland & Seattle Railway Company made, executed and delivered to the plaintiff a certain instrument in writing, of which the following is a copy:

ARTICLE OF SUBROGATION.

BE IT KNOWN, That the Union Assurance Society, of London, did insure the Spokane, Portland & Seattle Railway Company, under its Policy No. 65037, issued at its Portland, Oregon, Agency, as follows: $3750.00 on box-cars #S. P. 3164, 3287, 3187, 3041, 3179, an equal amount on each, for one year, commencing on the first day of March, 1921, and continuing until the 1st day of March, 1922.

FURTHER, that on the 11th day of September, 1921, a fire occurred, by which the property so insured was damaged or destroyed to the amount of Three Thousand Seven Hundred Twenty-eight and 52/100 Dollars, said fire having been caused by sparks from locomotive of the Oregon-Washington Railroad & Navigation Company:

NOW THEREFORE, in consideration of Three Thousand Fifty-six [28] and 49/100 ($3,056.49) Dollars, to us in hand paid by the said Union Assurance Society, of London, in full settlement of our claim against said company, by reason of said loss, damage and policy of insurance 65037, do hereby assign, set over, transfer and subrogate to the said Union Assurance Society, of London, all the right, claim, interest, choses, or things in action, to the

extent of Three Thousand Fifty-six and 49/100 ($3,056.49) Dollars paid to us as aforesaid, which we may have against Oregon-Washington Railroad & Navigation Co., or any other party, person, or corporation, who may be liable, or hereafter adjudged liable for the burning or destruction of said property, and hereby authorize and empower the said Union Assurance Society, of London, to sue, compromise, or settle in our name or otherwise, and it is hereby fully substituted in our place and subrogated to all our rights in the premises to the amount so paid. It being expressly stipulated that any action taken by said company shall be without charge or cost to the Spokane, Portland & Seattle Railway Company.

SPOKANE, PORTLAND & SEATTLE RAILWAY CO.

By ROBT. CROSBIE,
Secretary.

Signed, sealed and delivered in presence of
J. C. McCOMB.
J. M. BALLINGALL.

Dated November 1, 1921.

Plaintiff introduced further evidence tending to prove that such payments were so made by plaintiff to the Spokane, Portland & Seattle Railway Company pursuant to a claim made by the Spokane, Portland & Seattle Railway Company against the plaintiff under said policy of insurance.

Plaintiff introduced further evidence tending to prove that at the time of the fire the weather was dry and the vegetation [29] adjacent to the tracks

of the Spokane, Portland & Seattle Railway Company was dry and inflammable, and that various other fires were observed to start upon or near the railroad right of way in the same vicinity soon after the passage of said train, and that the fire which destroyed these box-cars was seen to start in dry grass upon or adjacent to the right of way immediately after the passae of said train, and that said train was a train of about sixty-three freight-cars, and that the locomotives drawing the said train were laboring or puffing, and were throwing out hot sparks or embers at the time of passing the said freight-cars which were burned, and that there was no other fire or cause of fire in the vicinity which might account for the setting of the fire which burned these box-cars.

Thereupon, pursuant to notice given and demand made by the plaintiff, the defendant produced from its files a certain bill rendered by the Spokane, Portland & Seattle Railway Company on or about the 15th day of November, 1921, together with the voucher check given in payment therefor. The said bill was a bill rendered by the Spokane, Portland & Seattle Railway Company to defendant for damage to said freight-cars numbered 3164, 3287, 3187, 3041 and 3179 by said fire of September 11, 1921, and was in words and figures as follows:

Portland, Oregon, Nov. 15, 1921.

Oregon-Washington R. R. & Navigation Co.,
F. W. Sercombe, Auditor,
Portland, Oregon.

To Spokane, Portland & Seattle Railway Company, Dr.

Remit to Chas. C. Rose, Treasurer, Portland, Ore.
Department Memo. No. 22882.

FOR Value of SP&S Cars 3287, 3187, 3164 and 3041, which were destroyed, and cost of repairs to SP&S Car 3179, which was damaged by fire September 11th, 1921, at McLaughlin, Washington, due to sparks from [30] your coal-burning engine passing over our line under detour arrangements.

SP&S 3041, 40′ box-car, 80,000 capacity, of wood construction, built October, 1910.		
Weight 35,100 lbs.		
Reproduction value at .0512 per lb.	$1797.12	
Less depreciation 10 yrs. 11 mo. at 4% per annum	784.74	
Depreciated value	1012.38	
Less net value of salvage recovered	103.77	
Net loss	908.61	
Less amount recovered from insurance	750.00	
		$158.61

SP&S 3164, 40′ box-car, 80,000 capacity, of wood construction, Built October, 1910, weight 35,800 lbs.		
Reproduction value at .0512 per lb.	1832.96	
Less depreciation 10 yrs. 11 mo. at 4% per annum	800.39	
Depreciated value	1032.57	
Less value of net salvage recovered	108.32	
Net loss	924.25	
Less amount recovered from insurance	750.00	
		$174.25
SP&S 3187, 40′ box-car, 80,000 capacity, of wood construction, built October, 1910. Weight 35,400 lbs.		
Reproduction value at .0512 per lb.	1812.48	
Less depreciation 10 yrs. 11 mo. at 4% per annum	791.45	
Depreciated value	1021.03	

Less net value of salvage recovered	99.65	
Net loss	921.38	
Less amount recovered from insurance	750.00	
		$171.38
SP&S 3287, 40′ box-car, 80,000 capacity, of wood construction. Built October, 1910. Weight 35,000 lbs.		
Reproduction value at .0512 per lb.	1817.60	
Less depreciation 10 yrs. 11 mo. at 4% per annum	793.67	
Depreciated value	1023.93	
Less net value of salvage recovered	106.14	
Net loss	917.79	
Less amount recovered from insurance	750.00	
		$167.79
		$672.03
SP&S 3179, Net cost of repairs per Vancouver Shop Order #2609	56.49	
Less amount recovered from insurance	56.49	
		No charge.

Amount of this bill, $672.03.

The said bill was on February 7, 1922, receipted by the Spokane, Portland & Seattle Railway Company, said receipt showing payment [31] thereof; and the voucher check attached to said bill was a voucher check of the defendant in favor of the Spokane, Portland & Seattle Railway Company for the sum of $672.03, which was marked paid and canceled.

The plaintiff then offered in evidence the said receipted bill and voucher check, and in connection with the offer thereof, the following statements were made and the following proceedings were had:

Mr. VEAZIE.—Your Honor, the document which I have called upon counsel to produce from the files of the Oregon-Washington Railroad & Navigation Company and which is now offered in evidence is a bill rendered by the Spokane, Portland & Seattle Railway to the Oregon-Washington Railroad & Navigation Company for the difference between the loss on these cars and the amount of the insurance; the bill contains description of the cars, the amount of the loss, the amount of the credit as having been paid by insurance, and the balance, and the receipt of that bill; various memoranda on it showing the approval of the bill by the Oregon-Washington Railroad & Navigation Company, and the draft or voucher check given by the Oregon-Washington Railroad & Navigation Company to the Spokane, Portland & Seattle Railway Company in payment of that bill, and knowing that an argument is to come, I will give to your Honor the grounds on which I offer that, the theory.

It is offered as an admission of liability, and I might name numerous authorities on the question, but I think the one probably most in point is Weiss vs. Kohlhagen (58 Ore. 144), and it is laid down there as a general rule that a payment of one claim growing out of a certain transaction may be proved as tending to show [32] an admission of liability as to other claims growing out of the same transaction.

(Here counsel cited and discussed other authorities.)

Now, in this case it will be observed that we are dealing with not only the same fire, the same accident, but we are dealing with the identical same damage, that is with the same box-cars; four of these box-cars were destroyed and one of them was damaged. As shown by the testimony of Mr. Wager, the loss on the four cars destroyed was something in excess of nine hundred dollars each, while the insurance was only $750.00 each. Now, these documents which I am offering in evidence show that the Oregon-Washington Railroad & Navigation Company was called upon by the Spokane, Portland & Seattle Railway Company for that difference amounting to $672.03, and the Oregon-Washington Railroad & Navigation Company paid that bill. So I say, your Honor, that our case is clearer and stronger than the case of Weiss vs. Kohlhagen—clearer and stronger than any of the other authorities to which I have referred.

Mr. MURPHY.—If the Court please, counsel has been frank in his statement of what purpose he ex-

pects to accomplish by the introduction of these documents, that it is an admission of liability, and I think that would be the conclusion reached by the jury if they hear it and it seems to me that these are absolutely inadmissible because, in the first place, the rule that is contended for by counsel in the case is one that assumes that the parties in the same transaction are on a parallel, and that the action taken with respect to one is equally applicable to another, but in the case we have here the position with respect to the Spokane, Portland & Seattle Railway Company is not, in our opinion, identical [33] with the claims of the Insurance Company here because—and this refers back again to the clause of the detour agreement which counsel contends for and which he has pleaded in the complaint.

We contend, as I urged before your Honor before, that a careful reading of that language of the detour agreement set forth there is that we agree to protect them against loss or damage on claims made against them. The language, the pertinent part is "The Home Company"—that is, the Spokane, Portland & Seattle Railway Company—"shall not be held liable for or on account of any damage to the cars of either company"—I am omitting some of the words—"which may be incurred or sustained by reason of such trains being detoured * * * in whatever manner the same may be caused or occasioned, whether by or through the negligence of the Home Company, its agents or servants" or otherwise. "It being understood and

agreed that all risk of such damage shall be and is hereby assumed by the Foreign Company, and the Foreign Company shall and will hold harmless the Home Company from and against all liability or claim for all such * * * damage."

Now counsel contends that by virtue of that contract and his contract of insurance that he is entitled to claim the advantage of that. Now his policy of insurance, which he has introduced in evidence here, clearly contemplated that his right of subrogation depends, not upon any contractual relation whereby we might assume different contractual relationship, but upon a claim of neglect or negligence in the doing of an act which causes a loss, and lines, 102, 103, 104 and 105, Standard Form of policy which he introduced here, and under which he claims to have the right of subrogation say, "If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the [34] extent of such payment to all right of recovery by the insured for the loss resulting therefrom." From what? From the act or neglect of any person or corporation. "Such right shall be assigned to this company by the insured on receiving such payment."

Now counsel's statement supplements this policy with the clause of the detour agreement that I have referred to, where, by some other contract, in order to route our trains over their line, we went further and, although it might not be wholly our neglect—it might be contributory negligence on their part—

for some purposes we agree to protect them against some loss.

Now we would obviously not be liable if for example, as in this case is my contention, we constructed our trains in the proper manner, and equipped them with the proper spark-arresting devices, had them examined and maintained them in repair, they were carefully operated by competent employees with proper fuel, not overworking or overloading them; even though this fire occurred we are not on that account guilty of negligence because we have done everything. We are not insurers against fire. In other words, there must be some finding of negligence.

Now it is only by a finding of negligence—because it must be for loss caused or resulting from neglect on our part—that he can be subrogated under this policy.

Now the fact that we made a payment under our contract to the Spokane, Portland & Seattle Railway Company by virtue of our contractual relationship with it certainly is not on a parity with insurance companies claiming as subrogee under this policy. That is my first contention.

The second contention is this—and I don't think [35] the cases are applicable, the cases he cites. I think that is the usual rule of course that admission in one could be taken advantage of by another similarly situated, but I don't think, as I say, for the reasons I have urged upon your Honor, that he is similarly situated.

In the second place, it will be noted by this bill

that it specifies the particular cars and their value. It says depreciated value so much; less net value of salvage recovered so much; net loss so much; less amount covered recovered from insurance so much. Then there is a bill rendered for the balance.

Now it appears on the face of this bill that the Spokane, Portland & Seattle Railway Company in rendering the bill clearly contemplated that there had been other payments made which they were giving us credit for, and they were accepting from us in each case a lesser amount than the full loss that they sustained.

In other words, our payment was made on the assumption that it was a matter of compromise and was purely as a matter of compromise, and I do not think a compromise settlement can ever be taken advantage of, especially since the claim of the Insurance Company here is taken by virtue of rights, if any, which the Spokane, Portland & Seattle Railway Company had. In other words, if compromise is made with the Spokane, Portland & Seattle Railway Company for a lesser amount than their damage, the Spokane, Portland & Seattle Railway Company could not come into court in its own name and say by reason of your payment of the lesser amount, we will now take it as an admission of liability and recover the balance of the loss from you. And that is what counsel is attempting to do, it seems to me, in this case.

COURT.—Does that detour agreement obligate the [36] O. W. R. & N. Co. to pay the damages that might occur to the cars regardless of blame?

Mr. MURPHY.—Under rather peculiar wording, I don't believe it would amount to that. We got into quite a dispute about the effect of it before. It is set forth on page 3 of the amended complaint and it says: "The Home Company"—that is the Spokane, Portland & Seattle Railway—"shall not be liable for or on account of any loss, damage or delay to the trains, engines, cars or other property of any kind of either company." In other words, liability would not be imposed on the Spokane, Portland & Seattle on account of damage to cars or freight carried upon the detoured trains nor on account of any injuries to passengers or employees of either company "by reason of such trains being detoured, or by reason of such trains being delayed in such detouring, in whatever manner the same may be caused or occasioned, whether by or through the negligence of the Home Company, its agents or servants, or by reason of defects in the tracks, structures or facilities furnished by the Home Company, or otherwise, it being understood and agreed that all risk of such delay, loss, damage, injury and death,"—that is loss caused by reason of the detour —"shall be and is hereby assumed by the Foreign Company, and the Foreign Company shall and will"—that is the risk is assumed by us and they are not liable—"and the Foreign Company shall and will hold harmless the Spokane, Portland & Seattle Railway Company from all liability or claims for all such damage," and "will execute and deliver or cause to be executed and delivered to the Home Company upon request a full and complete

release, satisfaction and discharge of all claims therefor, and will pay or cause to be paid all costs and expenses incurred by either company in the clearing of the wrecks and repairs to equipment, track and property in which by reason of detour movements covered by this agreement, the engines, trains or cars of the Foreign Company are concerned."

Now right there we agree to pay, and that of course is a contractual relationship that has nothing to do with this policy of insurance; we pay the costs; pay all "costs and expenses incurred [37] by either company in the clearing of the wrecks and repairs to equipment, track and property in which by reason of detour movements covered by this agreement," their trains are concerned.

In other words, we agree, in order to use their track, that any repairs necessary to their equipment or property, and the clearing away of wrecks resulting by reason of the detour were to be paid and borne by us. Now, under that they bill us for the repairs or damages to these cars, noting that they have made certain other claims, and want to collect the balance from us, as I say their bill indicates on the face of it.

COURT.—Your position, Mr. Murphy, I understand is you made this payment by reason of your contract, and under your contract and not because of any admission of any negligence on your part.

Mr. MURPHY.—That is my point.

Mr. VEAZIE.—I think, your Honor, that is a very interesting admission. I had not intended to

bring up at this time the construction of that detour agreement, but I think counsel's statement and this bill and the payment of this bill are very persuasive as showing the construction which the railroad company itself puts upon the agreement. That is, as Mr. Murphy says, they pay this bill not because they admit negligence but because they admit that they did set the fire; they admit that the Spokane, Portland & Seattle suffered this loss, and they admit that under their detour agreement, regardless of the negligence, they are obligated to pay. Now, that is virtually conclusive, I think, of the construction of that detour agreement.

But to turn to the other points discussed by counsel. He seems to think that under the terms of that policy and under the law applicable to such cases, we cannot claim subrogation unless there was negligence. The policy says clearly if this company shall claim that the fire was caused by the act or neglect of another—there is the disjunctive—that this company, [38] the Insurance Company, on paying the loss shall be entitled to be subrogated.

Now, this fire was caused by the act of the Oregon-Washington Railroad & Navigation Company whether it was negligent or not; it was its act running its train upon that track and scattering sparks on the dry grass, so we come within the terms of the policy.

But now look at the subrogation agreement. I haven't it in my hands but it constitutes an absolute assignment to the Union Assurance Society, of any

and all causes of action which the Spokane, Portland & Seattle Railway Company may have against the Oregon-Washington Railroad & Navigation Company growing out of this fire up to the amount of the insurance, and so, regardless of the policy terms, the Spokane, Portland & Seattle Railway has seen fit to assign to this company that cause of action, and it is an assignable cause of action, your Honor, regardless of the law of subrogation. It is a cause of action for damage to property which, under our laws, is assignable, and it has been assigned; no matter whether it grows out of contract or implied; whether it grows out of the common law or the particular contractual relations of the parties, this cause of action is assignable and it has been assigned.

I don't admit that even under the general law of subrogation, apart from the language of this policy and the language of that assignment, the right of subrogation is confined to cases of negligence. I think the rule is otherwise. I think that where a fire insurance loss is paid to the person with whom the Insurance Company has a contract that, by operation of law, the Insurance Company is subrogated to such causes of action as the assured may have against any other person, whether resting upon contract or upon negligence, but the policy of insurance and the assignment seem to me to set all such questions as that at rest.

Now, about this document, counsel seems to find on [39] its face some evidence of compromise. I

say there is not only no evidence of compromise but a clear admission of liability to the fullest extent of the claim.

He bases his argument as to compromise upon the idea that the Spokane, Portland & Seattle Railway Company had recovered part of this loss from the Insurance Company. Of course, the Insurance Company had paid $750.00 on each of these cars, and it would not have been an act of honesty for the S. P. & S. to try to collect that again from the O. W. R. N. Co. They didn't so attempt; it attempted to collect exactly the amount that remained due to it, that is to say the excess of the loss over the insurance, and it left the O. W. R. & N. Co. and the Insurance Company to deal with each other as to the three thousand odd dollars which the Insurance Company had paid. There was no compromise and no suggestion of compromise. There was no suggestion of any waiver of any right as to this insurance money. In fact, the Spokane, Portland & Seattle could not have waived that if it had tried to do so, and all in all it seems to me very clear that under the doctrine of the authorities that I have cited that this is admissible.

Now, as to the construction of this detour agreement, I had supposed that would come out later, but since the argument has been commenced, I am willing that that question should be discussed fully, and I am aided by the construction which counsel has placed upon it, and the construction which the company has placed upon it. They say they have

paid this money to the Spokane, Portland & Seattle not because they were negligent but because the detour agreement compelled them to do so, and so it did. In reading that agreement, the portion of it that appears on page 3 of the complaint, your Honor will see that it is very closely knit—the words are made to count. There is [40] not any repetition of the same idea, but one phrase, or one expression is not a repetition or a division of another phrase or expression, and it will bear close analysis upon the theory that every word has a meaning, and in that point of fact I wish to call your attention to a few expressions. "The Home Company shall not be held liable for or on account of any loss, damage or delay to the trains, engines, cars or other property of any kind of either company." The Home Company then shall not be held liable on account of any loss, damage or delay to its own property is what that means. But go a little further. "It being understood and agreed that all risk of such delay, loss, damage, injury and death shall be and is hereby assumed by the Foreign Company." Now, it is to be borne in mind that we are talking about risk of damage to property of the S. P. & S., the Home Company, shall be assumed by the Foreign Company, the O. W. R. & N. Co. What can that mean? It cannot mean that the Oregon-Washington Railroad & Navigation Company is to assume the liability of the Spokane, Portland & Seattle to somebody else. It can, as applied to the property of the Spokane, Portland & Seattle, only mean that the Oregon-Washington Railroad & Navigation Com-

pany, as the Foreign Company, shall be liable for or shall make good any loss which the Spokane, Portland & Seattle, the Home Company, may suffer to its own property through the detour movement of the Foreign Company. If it has not that meaning it has no meaning whatever.

Then go on a little further down. The Foreign Company "will pay or cause to be paid all costs and expenses incurred by either company in the clearing of the wrecks and repairs to equipment, track and property in which by reason of detour movements covered by this agreement, the engines, trains or cars of the Foreign Company are concerned." Now that means literally and explicitly [41] that the Oregon-Washington Railroad & Navigation Company, the Foreign Company, will make or pay for all repairs to the property of the Spokane, Portland & Seattle Company, which may be caused by any act of the Oregon-Washington Railroad & Navigation Company trains in connection with the detour. Counsel himself has stated that, within the meaning of that clause, the restoration of payment for those cars is within the meaning of repairs. The cars were not totally destroyed; there was some salvage in each case. And the word "repairs" if there were no more in the agreement, might reasonably be construed as covering this case, but, your Honor, it would be exceedingly strange if, finding on the face of that agreement, and express agreement, and express stipulation requiring the Oregon-Washington Railroad & Navigation Company to repair damage to equipment at its own ex-

pense, we should construe the remainder of the agreement so that the Spokane, Portland & Seattle Company would be required to bear the loss resulting from the total destruction of the car.

All in all, in view of the meaning of the detour agreement on its face, the very construction of it on its face, the construction which the parties have given it in this particular matter, and the construction which counsel himself puts upon it, it seems to me clear that under that detour agreement the Oregon-Washington Railroad & Navigation Company is bound to the Spokane, Portland & Seattle Railroad Company and therefore to us as the assignee of the Spokane, Portland & Seattle Company for its damage, regardless of the question of negligence. That has, I take it, only a collateral bearing on the question of the admissibility of this exhibit now offered, but I feel the admissions of counsel himself are sufficient to show that the evidence is competent.

Mr. MURPHY.—If you follow counsel's argument to its conclusion, your Honor, all that he would have to do under his policy would be to say that when any fire occurred we were detouring [42] cars over that line.

Mr. VEAZIE.—No, that you caused the damage. We have to show that.

Mr. MURPHY.—How do you mean caused? You don't mean negligence?

Mr. VEAZIE.—No.

Mr. MURPHY.—You make some distinction as between causing it and willfully causing it, as be-

ing responsible for it, as being an action on which you might have a cause of action independent of the contractual relationship?

Mr. VEAZIE.—No, I mean to say physically the act which brought about the damage; in this case you set the fire which destroyed these cars.

Mr. MURPHY.—If the Court please, there are very few fires that occur, except forest fires which occur out where lightning strikes that are not caused by somebody. A man wires your house and does a poor job, and the wires are left open, which causes a fire; a man drops a match or something. All fires are caused, except the fires which occur through nature, as I understand. Now, I don't understand the law in this state says we are an insurer, in other words, that we are responsible in any event.

COURT.—Suppose you have agreed in your detour contract to take care of this loss if you caused it, regardless of your own negligence.

Mr. MURPHY.—Then of course we would be bound to pay.

COURT.—Assuming that is the effect of the detour agreement, then would not this company be subrogated to the rights of the Home Company, as it is called in this contract, by virtue of this assignment, regardless of their policy?

Mr. MURPHY.—It is my contention, your Honor, that they cannot take the same right for two reasons. In the first place [43] I cited to your Honor some cases before. I have a memo-

randum but I haven't the authorities here. One case as I recall it was an express holding against it from New York. In that case the contractor had entered into an agreement with the owner of a building whereby he would protect the owner of the building from a loss due to his efforts, and I think—I haven't read the case recently; I can give the citation to it—he injured one by the falling of some bricks, and the contractor made certain payments or did certain things to the owner under his contract of indemnity, and it was claimed there as it is claimed here that that right passed to—I believe an indemnity company of the contractor, and the Court expressly stated that it is not such an agreement as would pass under the insurance policy and of which he could avail himself.

COURT.—The question I asked was what effect is to be given to this assignment or transfer of the cause of action that the railroad company delivered to the insurance company.

Mr. MURPHY.—I think it could only go to the transfer of the course that they could pursue against us if it were caused by negligence.

COURT.—Suppose your company had not made any payment at all in this matter, and the Home Company had assigned its claim to John Smith. Could he have maintained an action against you under this detour agreement?

Mr. MURPHY.—If they had assigned the right of action under the detour agreement?

COURT.—Their claim against your company, whatever it is?

Mr. MURPHY.—I don't know whether—if they had made an assignment under the detour agreement whether they would have had the right to sue us and claim by virtue of the contract or not. However, it does not seem to me that is the case.

COURT.—What I had in mind, if I am not interrupting— [44] the plaintiff has offered in evidence and there has been admitted in evidence an assignment by the Home Company, by the S. P. & S. Co., to the Insurance Company of its claim against your Company.

Mr. MURPHY.—Made pursuant to a demand under the terms of the insurance policy.

COURT.—The language of that is quite broad.

Mr. MURPHY.—Yes, but counsel himself says was made under the terms of the policy.

COURT.—Yes, after they made demand under the policy for payment, they assigned it. The company is not claiming in this case alone under the doctrine of subrogation but by virtue of the provisions in this policy.

Mr. MURPHY.—Insurance company?

COURT.—Yes.

Mr. MURPHY.—No, counsel set that up, and I argued against it, and your Honor stated you thought it was explanatory of the circumstances under which we moved our trains. You did not pass upon the proposition as to whether or not—

COURT.—The detour agreement?

Mr. MURPHY.—The detour agreement—whether or not under the detour agreement they would have the right. It is my contention they wouldn't have,

if made pursuant to a demand under the insurance policy, and even though it might be broad enough to include a right under the detour agreement, yet they didn't have any right to claim it except in accordance with the terms of the policy, and to that extent they had to show some negligence which would be actionable in law.

And further there is the other feature, as I say, that as far as this payment is concerned it shows clearly that it is for less loss than that actually sustained—that it is made upon the proposition there had been a recovery. Counsel says [45] that fair dealing on the part of the Spokane, Portland & Seattle Railway Company would compel them to state that. That is true; fair dealing would, but they give credit on account of the loss for the moneys that they have recovered, and after showing that fact they don't say they will take the $179.00 and leave the $750.00 outstanding, but they put it as a credit and give them less than the amount due. That was on the assumption that the Oregon-Washington Railroad & Navigation Company would have the benefit of the salvage as well as the insurance which they have on their property; in other words, it was loss sustained by the Home Company. We were to protect them against loss, and they didn't lose because they had paid their premiums and recovered their insurance, and we paid them a lesser amount with the understanding that we would not pay further, so I think from that feature of it, being in the nature of an expression of compromise instead of expression of liability, it

should not be admitted because admittedly whether they would take under the detour agreement or whether they would take under the policy of insurance this claimant stands, as far as the subrogated rights are concerned, in the shoes of the Spokane, Portland & Seattle Railway Company, and it couldn't obviously claim on any different terms from that. Whether it has all its rights or not may be a question, but it certainly could not claim beyond the obligation of the Spokane, Portland & Seattle Railway Company. So I say, suppose after the fire had occurred this insurance company had rendered us a bill such as I hold here, saying that by virtue of these cars having been damaged on account of our act, that they rendered us a bill for $673.02, and we paid the insurance company that sum, could they then turn around and say that because we paid that sum we had admitted responsibility on the balance of the account, where they had shown that they had given us credit for the balance on their own bill? [46]

COURT.—The Court is of the opinion that the objection to the evidence offered by the plaintiff is well taken. The Spokane, Portland & Seattle Railway Company and the Insurance Company do not occupy the same relationship to the defendant company, and therefore the evidence would not be admissible on the theory that they are in the same position. The defendant company was using the line of the Spokane, Portland & Seattle Railway Company under a written agreement between them and that agreement fixed their rights and liabilities,

one to the other, so that any adjustment of their affairs would be under and in pursuance of that agreement or such interpretation as the parties may have given that agreement. This case, however, as I understand the record and pleadings, is based upon the charge of negligence. It is charged in the complaint that through the negligence and carelessness of the defendant company this property was destroyed, and that by reason of that fact the insurance company was compelled to and did pay a certain sum of money to the assured, and it is that sum it is seeking to recover in this action, and under this complaint it seems to me quite clear the action must proceed on the charge of negligence and not by reason of any agreement or understanding between the two companies concerning the occupation of this line. For that reason the objection will be sustained.

Mr. VEAZIE.—I will save an exception to the ruling and while it may be useless for me to reopen that question, the view your Honor has taken, was not it based on the argument that the complaint is based wholly on negligence? If I might be permitted to say a word on that.

COURT.—I have taken the language of the complaint for its face value.

Mr. VEAZIE.—I think, your Honor, that the complaint is [47] capable of the construction that it is founded not only upon negligence but upon the contract and I think that theory was fully brought out when the complaint was under consideration on the motion of counsel to strike out por-

tions of it. There were motions made to strike out these allegations here on page 3 containing a portion of the contract between the two companies, and the matter was gone into at considerable length at that time, and I thought it was clear at that time that the complaint was in a double aspect and that we could rely on both aspects of the complaint in the absence of any motion to require us to elect, and I don't believe a motion to elect would be permissible.

Now it is true the complaint contains allegations of negligence, but in the third paragraph we set up this contract for the express purpose of showing that under its terms the Foreign Company assumed liability regardless of negligence. That was the sole purpose of that allegation, to bring that contract into the case. That set up that the train was being operated under and pursuant to that contract, and while we do set up allegations tending to show negligence, I do not believe that they overcome the obvious effect or construction of pleading the contract liability and we allege that the fire was caused by the defendant, and that they set these very cars on fire, destroyed three of them and damaged the fourth, and then in the last paragraph on page 5 we allege that upon payment by plaintiff to the Spokane, Portland & Seattle Railway Company of said sum of $3,056.49 as aforesaid, and in consideration thereof, the Spokane, Portland & Seattle Company did assign, set over, transfer and subrogate" its cause of action for and on account of loss and damage of the freight-cars. I don't say we set

up a cause of action only on account of negligence. We have set up a cause of action which would be complete in itself regardless of the negligence; we have set up also [48] a cause of action on the negligence. I think reading the complaint you will find it contains a complete statement of the cause of action based upon this contract liability. That has been our theory from the beginning. In the argument of the motion to strike out we took that ground so it is no surprise to counsel.

COURT.—I looked at the record and everything that was filed at the time that motion was disposed of and it was overruled on the theory that this allegation explains the reason why the Oregon-Washington Railroad & Navigation Company was using that line at that time, but I am unable to construe this complaint in any way other than an action for negligence, because if it had been brought on the assignment claim it would simply have been alleged in straight language that the defendant company by reason of the contract incurred liability, and that that liability had been assigned to the Insurance Company and the question of negligence would not have been alleged in the complaint, so I am constrained to hold that this is based upon negligence as it stands now.

Mr. VEAZIE.—I ask for an exception.

COURT.—Yes, you may have your exception.

The defendant then introduced evidence tending to show that its locomotives were properly and skillfully constructed, equipped and operated and had the appliances and devices of the best and most

approved character to prevent escape of dangerous sparks or embers, and that said locomotives were inspected frequently and kept in good order, and that the spark-arresting devices on said locomotives were found to be in good order on the day prior to this fire, and that the escape of a certain amount of sparks capable of setting fire to dry vegetation cannot be avoided in the practical operation of coal-burning [49] locomotives, and that at the time and place of the setting of this fire the locomotives of defendant were not overloaded and were not proceeding at an unusually high rate of speed, or laboring heavily, or otherwise being so operated as to cause the escape of quantities of sparks in excess of the quantities ordinarily to be expected under normal and careful operation.

Before the commencement of the argument to the jury and before the giving of the instructions of the Court to the jury, the plaintiff submitted in writing a request that the Court give to the jury certain instructions, which, according to the practice of the Court, were numbered and stated separately; and among the instructions so requested was the following, which was numbered 4:

> "It is admitted by the pleadings that the defendant was operating this train over the tracks of the Spokane, Portland & Seattle Railway Company under a written agreement, which contained certain provisions alleged in the complaint and admitted by the answer. I instruct you that under those provisions, the defendant assumed liability to the Spokane,

Portland & Seattle Railway Company for any damage which might be done to the property of the Spokane, Portland & Seattle Railway Company through the operation over its tracks of the defendant's trains; and the plaintiff as assignee of the Spokane, Portland & Seattle Railway Company, is therefore entitled to your verdict, if you find that defendant's locomotives set this fire, even though you may believe that defendant was not negligent."

The said request was refused, and to such refusal the plaintiff took an exception in the language hereinafter set forth.

The Court gave to the jury the following instructions, and exceptions thereto were taken as follows: Gentlemen of the Jury: [50]

Instructions of Court to the Jury.

On the 11th of September, 1921, certain box-cars belonging to the Spokane Portland & Seattle Railway Company and located on a spur at McLaughlin Station two miles east of Vancouver were destroyed or injured by fire. The plaintiff company had issued a policy in favor of the Spokane, Portland & Seattle Railway Company to cover such loss and after the fire it had an adjustment with the company and paid for the loss up to and including the extent of its policy amounting in the aggregate to $3,056.49. This amount it now seeks to recover in this action from the defendant railway company on the ground and for the reason that the origin of the fire was due to the negligence and carelessness of the defendant company in the operation of a train over the line of the Spokane, Portland & Seattle Com-

pany. If, as a matter of fact, the loss was due to the negligence and carelessness of the defendant company, the plaintiff would be entitled to recover in this case, and the first question therefore for you to determine will be whether the fire which destroyed and injured these cars was caused by sparks or fire escaping from the defendant's engine.

The evidence shows, and it was not controverted, that one of the defendant's freight-trains passed by this point going east a few minutes or a short time before the fire occurred, and it is claimed by the plaintiff that the fire originated from sparks or fire escaping from the engine propelling that train. The answer of the defendant denies that it was [51] responsible for the fire, or that it occurred by reason of its carelessness or negligence, or by sparks or cinders or coals escaping from its engine.

Now, in that connection and in determining this question you will consider the evidence bearing on that point and the natural inferences to be drawn from it. You may consider the time the fire occurred with reference to the passing of the defendant's train, the proximity or distance of the place of origin of the fire from the railroad track, the nature and location of the inflammable material in which the fire started, the absence of other sources from which the fire might reasonably be found from the evidence to have originated, the occurrence of other fires under like circumstances in the same vicinity which started soon after the passing of this train, and in such manner that they might reasonably be attributed to it, if you find from the

evidence that there were other such fires and all the other circumstances disclosed by the evidence bearing upon the probability that the fire which destroyed these box-cars was started by the locomotive of the defendant. It is not necessary that plaintiff should prove that a spark or cinder from this locomotive was actually seen to start this fire. It is sufficient if the preponderance of the evidence leads you in the exercise of reasonable judgment, to the belief that the fire was caused by the defendant's locomotive.

Where a fire is discovered on or along the right of way of a railroad company about the time or soon after the passage of a train, and there is no [52] other probable explanation of its origin, the jury will be justified in inferring or believing that it was started by fire from the engine, and so in this case, if you believe these fires were discovered along the right of way soon after the passage of the train of the defendant company, and there is no other reasonable explanation appearing from the testimony as to the origin of the fire, you would be justified in believing as a matter of fact that the fire was caused by the sparks or cinders or coal from the engine.

This is a question for you to determine from the testimony, and you can determine it from the evidence as it appears to you and as you understand it. If you do not believe from the preponderance of the evidence that the fire was caused by sparks or cinders escaping from the engine of the defendant

company, then of course the plaintiff would not be entitled to recover.

If you do so believe, it will then be necessary for you to proceed to examine the question as to whether the company was negligent in allowing these sparks or coals to escape from the engine, and whether such negligence was the proximate cause of the injury.

The mere fact that a fire occurred and that it might have originated from the defendant's locomotive is not of itself sufficient to entitle the plaintiff to recover. It must further appear that the negligence on the part of the defendant was in one or more of the particulars set forth in the complaint, and the complaint alleges in substance that the negligence [53] consisted in operating an engine without proper equipment, without proper appliances to prevent the escape of fire, and with an overloaded train, and in other particulars you will observe in the complaint.

A railway company in operating its road or a train over a road has a right to use engines propelled by the use of fire and steam and in doing so the duty devolves upon it of using reasonable care to so operate them as to do as little damage as practicable to property along and adjacent to the right of way on account of escape of fire from its engines. It is also its duty to exercise reasonable care in obtaining and equipping the engine used by it with the most approved appliances to prevent the escape of fire and to keep such appliances and the engines and equipment—or to exercise reasonable

care to keep them in good repair and when operating the engines to provide skillful and competent servants to operate the same.

If you find that the fire from which the damage in this case ensued was caused by sparks or cinders emitted from the locomotive of the defendant company, and that such damage resulted to the plaintiff as alleged in the complaint, an inference or presumption of negligence arises against the defendant in the construction, management and repair of its engines and unless such evidence is overcome by evidence on the part of the defendant showing to your satisfaction that its engines at the time of the fire were properly equipped and constructed, and that it had exercised [54] ordinary and reasonable care to provide and put into use approved appliances for arresting sparks and cinders and preventing the escape of fire, and that the engine was properly operated and with skillful and competent employees, and was in good repair, it will be your duty to find for the plaintiff in such sum as is shown in this case. In other words, it is sufficient to establish a *prima facie* case upon the part of the plaintiff for it to show that the fire was communicated from the engine of the defendant to the property destroyed in this case, resulting in the damage or destruction thereof, and with such proof arises a presumption of negligence in the construction or management of the engine or that it was out of repair, and casts upon the defendant the burden of rebutting and overcoming such presumption by competent and satisfactory evidence.

In overcoming this presumption it is the duty of the defendant company to satisfy you by a preponderance of the evidence that the locomotive was properly equipped, handled and operated, and that due care and caution had been exercised by the company in its construction and equipment and in keeping it in repair so as to prevent the emission of sparks and fire as far as that end could be obtained by reasonable care without impairing the efficiency of the locomotive. If there was no defect in the engine and it was in good repair, and if the defendant had exercised reasonable care to keep it in reasonable and good condition so as to prevent the escape of live cinders or coals while it was being operated, and [55] the engine was operated with ordinary care and skill under the circumstances, and a fire occurred and communicated to the property in question, the defendant would not be liable.

It is not possible to propel steam locomotives in such a manner as to absolutely prevent the emission of sparks of fire in their operation. The law does not require that engines used in the manner that defendant used the same shall be so constructed, equipped and managed that no sparks shall escape from them, and as sparks will be emitted—ordinary and usual quantity—that is to say such quantity as naturally would be emitted from an engine upon which the defendant shall have used reasonable care, diligence and precaution in equipping with modern and approved spark-arresting devices, and shall have operated in its usual course of business by competent employees, and if fire occurs from such

sparks the defendant would not be liable. All the law requires of it is the exercise of ordinary and reasonable care, such care as an ordinarily reasonable person engaged in such business, and under all the circumstances would have exercised, and if it does that then it has discharged all the duties the law imposes upon it.

It is not an insurer. It does not guarantee nor is it required to quarantee that no fire shall issue from the engine, or no sparks will issue from it, but it is required to exercise reasonable care to provide the engine with the latest improved devices to prevent the escape of fire and sparks, and to keep such appliances in repair, and to [56] provide skillful and competent servants to operate its engines and to see that they operate them in a skillful and proper manner so that fire will not escape.

When it has done all this then it has discharged the duty the law imposes upon it and would not be liable, but if it fails to do so it is liable for the consequences of its negligence. Therefore if the fire in this case was communicated from the engine of the defendant company, but from the preponderance of the evidence you believe it exercised the care and diligence that I have pointed out to you in the equipment and repair of its engine and appliances intended to prevent the escape of sparks, cinders and coals, and that the employees exercised reasonable and ordinary care in the operation of this engine, then, even though you do find that the fire was caused by the engine of the defendant

company under such circumstances, it would not be liable because it would not be negligent, but if it did not do so it would be responsible for the consequences of its negligence.

As I have said to you a moment ago, the fact that fire escaped from an engine and communicated to the adjoining property is sufficient to impose the burden upon the defendant company to show that it did not escape through its carelessness or negligence in the maintenance or operations of its engines.

Now, there has been something said in this case about the condition of the right of way of the Spokane, Portland & Seattle Railway Company. There [57] is evidence tending to show that there was inflammable material along that right of way. That fact, if it is a fact, should be considered by you in determining whether or not the defendant company exercised ordinary and reasonable care to equip and maintain its engines in proper condition to prevent the escape of fire, and if it did not do so and fire escaped by reason of its negligence it would be no defense in this action that the right of way of the Spokane, Portland & Seattle Company was covered with inflammable material. The issue in this case is whether or not this fire was due to the negligence and carelessness of the defendant company. If it was then it is responsible. If it was not then it is not responsible.

Now, the questions in this case are questions of fact, and they are exclusively for you to determine. You are the exclusive judges of all questions of

fact, and if at any time during the progress of the trial the Court has indicated or intimated its views as to any question of fact or as to what a witness testifies, you are to disregard it and find the facts according to the testimony as you understand it.

Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which a witness testifies, by his appearance upon the witness-stand. You are not bound to find your verdict in conformity with the testimony of the greater number of witnesses against the lesser, but you must find it in accordance with the reasonable preponderance of the testimony as you understand it, and in [58] doing so you are to apply to the testimony given in this case your own experience and your own good judgment.

Now, the amount involved in this case is not in controversy. There is no dispute but what the insurance company paid to the Spokane, Portland & Seattle Railway Company the money that it is seeking to recover in this case, so if it is entitled to recover at all it is entitled to recover in the full amount prayed for.

Mr. MURPHY.—Will the Court allow an exception to the refusal to give the instructions asked for?

The COURT.—Which ones?

Mr. MURPHY.—I submitted one about the use of coal—Instructions 16 and also 15, I believe neither one of which your Honor gave.

COURT.—I suppose it is unnecessary to say to the jury that they are to find and determine in

this case upon the evidence as given on the trial and not the opening statements of counsel on either side; so that any statement counsel on either side may have made in the opening address and has not substantially supported by testimony are to be disregarded by the jury. It is true and a fact that the railroad company has a lawful right to use coal in operating its engines.

Mr. MURPHY.—I think perhaps I misunderstood at the start of your instructions; your Honor in discussing the matter of the origin of the fire said that it was sufficient if the testimony showed that the fire was started from our locomotive. Later you [59] amplified that by saying that it had not only to come from our locomotive but occurred through negligence. It seemed at the time I heard it that the jury might be misled by the word "sufficient."

COURT.—I think the jury will understand from the instructions that there must not only be evidence that the fire started from the defendant's engine but was due to their negligence and carelessness.

Mr. VEAZIE.—I presume that is not intended to modify the instructions already given to the effect that the occurrence of the fire if traced to the railroad—

COURT.—There arises a presumption that has to be overcome by the defendant.

Mr. VEAZIE.—I think your Honor did not give any part of my requested instruction No. 5. The point that I wish to make in that connection is as

to the degree of care depending upon the circumstances; what will constitute reasonable care under one set of circumstances might not be reasonable under another.

COURT.—I attempted to cover that; I don't know whether I did or not. The jury will understand that by the term "reasonable care" is meant such care as a reasonably prudent person would exercise under similar circumstances.

Mr. VEAZIE.—I will ask an exception to the failure to give instruction requested No. 4.

Mr. MURPHY.—May I have exception to failure to give our No. 4, which has to do with the failure of the Spokane, Portland & Seattle Railway Company to clear its right of way.

Upon the conclusion of the instructions to the jury, the jury retired for deliberation, and thereafter returned a verdict in favor of the defendant. [60]

In the District Court of the United States for the District of Oregon.

No. L.–8953.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

Plaintiff,

vs.

OREGON–WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Order Settling Bill of Exceptions.

United States of America,
State and District of Oregon.—ss.

I, R. S. Bean, the Judge before whom the above-entitled cause was tried, do hereby certify that the foregoing bill of exceptions was served and presented within the time and in the manner provided by law and by the rules and orders of the Court; that thereafter the defendant presented and filed certain proposed amendments to the said bill of exceptions, and the said proposed amendments came on duly to be heard, the plaintiff appearing by Mr. J. C. Veazie, one of its attorneys, and the defendant appearing by Mr. Arthur A. Murphy, one of its attorneys; and upon such hearing the said amendments were allowed in part and denied in part; and in so far as allowed, have been incorporated in and form part of the foregoing bill of exceptions as now certified, and the said bill of exceptions, as so amended and as hereinbefore set forth, is hereby allowed and settled, and certified as the true bill of exceptions in the above-entitled cause, and is hereby made a part of the record herein; and the Clerk is hereby directed to file the same.

Dated this 22d day of October, 1923.

R. S. BEAN,
Judge.

District of Oregon,
County of Multnomah,—ss.

Due service of the within bill of exceptions is

hereby accepted in Portland, Multnomah County, Oregon, this 14th day of August, 1923, by receiving a copy thereof, duly certified to as such by J. C. Veazie, of attorneys for plaintiff.

ARTHUR A. MURPHY,
Of Attorneys for Defendant.

Filed October 22, 1923. G. H. Marsh, Clerk. [61]

AND AFTERWARDS, to wit, on the 13th day of December, 1923, there was duly filed in said court a petition for writ of error, in words and figures as follows, to wit: [62]

In the District Court of the United States for the District of Oregon.

No. L.–8953.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

Plaintiff,

vs.

OREGON–WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Petition for Writ of Error and Supersedeas.

The Union Assurance Society, Ltd., plaintiff in the above-entitled case, feeling itself aggrieved by the verdict of the jury and the judgment entered therein on the 15th day of June, 1923, whereby it was adjudged that plaintiff take nothing by this action and that defendant have judgment against

the plaintiff for its costs and disbursements, taxed at $46.20, comes now by Veazie and Veazie, its attorneys, and petitions said Court for an order allowing said plaintiff to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit; and also that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings in this court be suspended and stayed until the determination of such writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will forever pray.

VEAZIE & VEAZIE,
J. C. VEAZIE,
Attorneys for Plaintiff.

Filed December 13, 1923. G. H. Marsh, Clerk. [63]

AND AFTERWARDS, to wit, on the 13th day of December, 1923, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [64]

In the District Court of the United States for the District of Oregon.

No. L.–8953.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Comes now the plaintiff and files the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above-entitled cause, as follows:

I.

That the United States District Court for the District of Oregon erred in excluding from evidence and from consideration by the jury, and in refusing to admit in evidence in said cause that certain written instrument offered in evidence by the plaintiff and hereinafter set forth, together with the voucher-check thereto attached, being a voucher-check of the defendant in favor of the Spokane, Portland & Seattle Railway Company for the sum of $672.03 which was marked "paid and cancelled," said instrument being a bill of the Spokane, Portland & Seattle Railway Company against the de-

fendant and being receipted so as to show payment by the defendant on or about the 7th day of February, 1922, and said instrument or bill being in words and figures, as follows:

Portland, Oregon, Nov. 15, 1921.

Oregon-Washington R. R. & Navigation Co.,
F. W. Sercombe, Auditor,
Portland, Oregon.

To Spokane, Portland & Seattle Railway Company, Dr.

Remit to Chas. C. Rose, Treasurer, Portland, Ore.
Department Memo. No. 22882.

For value of SP&S Cars 3287, 3187, 3164 and 3041, which were destroyed, and cost of repairs to SP&S Car 3179, which was damaged by fire September 11, 1921, at McLaughlin, Washington, due to sparks from your coal burning engine passing over our line under detour arrangements. [65]

SP&S 3041, 40′ box-car, 80,000 capacity, of wood construction, built October, 1910.	
Weight 35,100 lbs.	
Reproduction value at .0512 per lb.	$1797.12
Less depreciation 10 yrs. 11 mo. at 4% per annum	784.74
Depreciated value	1012.38
Less net value of salvage recovered	103.77
Net loss	908.61

Less amount recovered from insurance	750.00	
		$158.61
SP&S 3164, 40′ box-car, 80,000 capacity, of wood construction, Built October, 1910, weight 35,800 lbs.		
Reproduction value at .0512 per lb.	1832.96	
Less depreciation 10 yrs. 11 mo. at 4% per annum	800.39	
Depreciated value	1032.57	
Less value of net salvage recovered	108.32	
Net loss	924.25	
Less amount recovered from insurance	750.00	
		$174.25
SP&S 3187, 40′ box-car, 80,000 capacity, of wood construction, built October, 1910. Weight 35,400 lbs.		
Reproduction value at .0512 per lb.	1812.48	
Less depreciation 10 yrs. 11 mo. at 4% per annum	791.45	
Depreciated value	1021.03	

Less net value of salvage recovered	99.65	
Net loss	921.38	
Less amount recovered from insurance	750.00	
		$171.38
SP&S 3287, 40′ box-car, 80,000 capacity, of wood construction. Built October, 1910. Weight 35,000 lbs.		
Reproduction value at .0512 per lb.	1817.60	
Less depreciation 10 yrs. 11 mo. at 4% per annum	793.67	
Depreciated value	1023.93	
Less net value of salvage recovered	106.14	
Net loss	917.79	
Less amount recovered from insurance	750.00	
		$167.79
		$672.03
SP&S 3179, Net cost of repairs per Vancouver Shop Order #2609,	56.49	
Less amount recovered from insurance	56.49	
		No charge.

Amount of this bill is $672.03.

II.

That the said Court erred in refusing to give to the jury the instruction requested in writing by plaintiff and being by it numbered 4 and which was in words as follows, to wit: [66]

> "It is admitted by the pleadings that the defendant was operating this train over the tracks of the Spokane, Portland & Seattle Railway Company under a written agreement, which contained certain provisions alleged in the complaint and admitted by the answer. I instruct you that under those provisions, the defendant assumed liability to the Spokane, Portland & Seattle Railway Company for any damages which might be done to the property of Spokane, Portland & Seattle Railway Company through the operation over its tracks of the defendant's trains; and the plaintiff as assignee of the Spokane, Portland & Seattle Railway Company, is therefore entitled to your verdict, if you find that defendant's locomotive set this fire, even though you may believe that defendant was not negligent."

III.

That the Court erred in rendering judgment in the said cause in favor of the defendant and against the plaintiff.

WHEREFORE, the said plaintiff prays that the judgment of the District Court of the United States for the District of Oregon in this cause be reversed

and for such further relief as may be proper in the premises.

VEAZIE & VEAZIE,
J. C. VEAZIE,
Attorneys for Plaintiff.

Filed December 13, 1923. G. H. Marsh, Clerk. [67]

AND AFTERWARDS, to wit, on Thursday, the 13th day of December, 1923, the same being the 32d judicial day of the regular November term of said Court,—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [68]

In the District Court of the United States for the District of Oregon.

No. L.–8953.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Minutes of Court—December 13, 1923—Order Allowing Writ of Error.

Upon the motion of the Union Assurance Society, Ltd., plaintiff in the above-entitled cause, by Veazie

and Veazie, its attorneys, and upon the filing herein by said plaintiff of its petition, it is ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein and that the amount of bond on said writ of error be and hereby is fixed at Five Hundred Dollars ($500.00); and that upon the giving of such bond all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: This 13th day of December, 1923.

R. S. BEAN,
District Judge.

Filed December 13, 1923. G. H. Marsh, Clerk. [69]

AND AFTERWARDS, to wit, on the 13th day of December, 1923, there was duly filed in said Court a bond on writ of error, in words and figures as follows, to wit: [70]

In the District Court of the United States for the District of Oregon.

No. L.–8953.

UNION ASSURANCE SOCIETY, LTD., a Corporation,

Plaintiff,

vs.

OREGON–WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, That we, the said Union Assurance Society, Ltd., a corporation, organized under the laws of the United Kingdom of Great Britain and Ireland, as principal, and the American Surety Company, a corporation organized under the laws of the State of New York, as surety, are held and firmly bound unto the above-named Oregon-Washington Railroad & Navigation Company, a corporation, in the sum of Five Hundred and no/100 Dollars ($500.00), to be paid to the said Oregon-Washington Railroad & Navigation Company, for the payment of which well and truly to be made we bind ourselves, and each of us, and our and each of our successors, jointly and severally, firmly by these presents.

Signed with our seals and dated this 13th day of December, 1923.

The condition of this obligation is such that whereas the above-named Union Assurance Society, Ltd., has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment rendered and entered in the above-entitled cause by the District Court of the United States for the District of Oregon on the 15th day of June, 1923;

NOW, THEREFORE, if the said Union Assurance Society, Ltd., as such plaintiff in error, shall prosecute said writ to effect and answer all damages and costs if it shall fail to make good its plea, then

this obligation shall be void; but otherwise it shall be and [71] remain in full force and virtue.

IN TESTIMONY WHEREOF, the said principal and surety have caused these presents to be executed by their duly authorized representatives this 13th day of December, 1923.

UNION ASSURANCE SOCIETY, LTD.,
By J. C. VEAZIE,
Its Attorney.

[Seal] AMERICAN SURETY COMPANY.
By W. J. LYONS,
Resident Vice-president.
Attest: W. A. KING,
Resident Ass't Secretary.

The foregoing bond is hereby approved this 13th day of December, 1923.

R. S. BEAN,
Judge.

Filed December 13, 1923. G. H. Marsh, Clerk. [72]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from 3 to 72, inclusive, constitute the transcript of record on said writ of error, in the

case in said court in which the Union Assurance Company, Ltd., a corporation, is plaintiff and plaintiff in error, and the Oregon-Washington Railroad & Navigation Company, a corporation, is defendant and defendant in error; and that said transcript is a full, true and correct transcript of the record and proceedings had in said court in said cause as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is Nineteen 75/100 Dollars, and that the same has been paid by the said plaintiff in error.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 21st day of February, 1924.

[Seal] G. H. MARSH,
Clerk. [73]

[Endorsed]: No. 4203. United States Circuit Court of Appeals for the Ninth Circuit. Union Assurance Society, Ltd., a Corporation, Plaintiff in Error, vs. Oregon-Washington Railroad & Navigation Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Oregon.

Filed February 25, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States for the District of Oregon.

January 11, 1923.

L.–8953.

UNION ASSURANCE SOCIETY

vs.

OREGON–WASHINGTON RAILROAD & NAVIGATION COMPANY.

Order Extending Time to and Including February 28, 1924, to File Record and Docket Cause.

Now, at this day, for good cause shown, IT IS ORDERED that the time for filing the transcript of record in this cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, extended to and including February 28, 1924.

R. S. BEAN,
Judge.

[Endorsed]: No. 4203. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including February 28, 1924, to File Record and Docket Cause. Filed Jan. 28, 1924. F. D. Monckton, Clerk. Refiled Feb. 25, 1924. F. D. Monckton, Clerk.